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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 THOMAS NGUYEN,

11 Plaintiff,

12 v.

13 SAN DIEGO POLICE OFFICERS
14 EDUARDO LOPEZ (#6654) & DAVID
VALDEZ (#6562) ,

15 Defendants.
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) Case No. 11-cv-2594 (WQH) MDD
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PRETRIAL ORDER
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) PRETRIAL CONF.: April 17, 2015
) TIME: 11:00 a.m.
) CTRM: 14B
) JUDGE: Hon. William Q. Hayes
)
)
)

19 Following pretrial proceedings and pursuant to F.R.Civ.P.16 and Local Rule
20 16.1(7)(c), IT IS ORDERED:
21

I

22 This is a lawsuit alleging violations of 42 U.S.C. § 1983. The plaintiff is
23 Thomas Nguyen. The defendants are San Diego Police Officers Eduardo Lopez
24 and David Valdez. Plaintiff alleges that defendants violated his free-speech rights
25 under the First Amendment to the United States Constitution, and that they violated
26 the Fourth Amendment by falsely arresting him and using excessive force against
27 him.
28

1 The pleadings that raise the issues are plaintiff's First Amended Complaint
2 (Docket No. 69) and the Answer of Defendants San Diego Police Officers Eduardo
3 Lopez and David Valdez to Plaintiff's First Amended Complaint (Docket No. 76).

4 II

5 Federal jurisdiction is invoked upon the grounds that this action is brought
6 under 42 U.S.C. § 1983 and thus raises a federal question. Venue is proper because
7 the claims arise from events that took place in the Southern District of California.

8 III

9 The following facts are admitted and require no proof:

10 1. On December 30, 2010, the Port of San Diego held its annual Big
11 Balloon Parade (also known as the Holiday Bowl Parade) on Harbor Drive in San
12 Diego, California.

13 2. Plaintiff protested against the Central Intelligence Agency ("CIA") on
14 and around Harbor Drive during the 2010 Big Balloon Parade, both verbally and
15 through a hand-printed sign he carried.

16 3. Defendants are police officers employed by the San Diego Police
17 Department.

18 4. Defendants were assigned patrol duties at the 2010 Big Balloon
19 Parade.

20 5. Defendants removed plaintiff from the parade route, took his sign,
21 handcuffed him, and put him in the back seat of a patrol car.

22 6. Defendants or other officers of the San Diego Police Department
23 requested that the San Diego County Psychiatric Emergency Response Team
24 ("PERT") assess plaintiff to determine whether he should be evaluated at a certified
25 psychiatric facility pursuant to California Welfare and Institutions Code section
26 5150.

27 7. Defendants were acting under color of state law regarding their actions
28 challenged in this action, in their capacities as San Diego Police Officers.

8. PERT Clinician Kathryn Alban and San Diego Police Officer Michael Moran responded to the officers' request for a PERT assessment.

9. After Ms. Alban assessed plaintiff, she decided that that he should be evaluated at a certified psychiatric facility pursuant to California Welfare and Institutions Code section 5150.

10. Officer Moran and Ms. Alban took plaintiff to Scripps-Mercy Hospital for further evaluation.

11. Plaintiff remained at Scripps-Mercy Hospital for two days.

IV

The reservations as to the facts recited in paragraph III above are as follows:

Regarding fact 11, Defendants object to any testimony or evidence as to Scripps-Mercy Hospital's diagnosis and release of Plaintiff. Such evidence is irrelevant, unduly prejudicial, and potentially confusing. Defendants are concerned that plaintiff may argue that Scripps-Mercy Hospital's diagnosis somehow casts doubt on the assessment of plaintiff that defendants and Ms. Alban made at the parade.

V

The following facts, though not admitted, are not to be contested at the trial by evidence to the contrary:

None

VI

The following issues of fact, and no others, remain to be litigated upon the trial:

1. What were the facts and circumstances known to defendants when they seized plaintiff on December 30, 2010?

2. When defendants seized plaintiff, did they believe, or entertain a strong suspicion, that plaintiff was as a result of a mental disorder gravely disabled, or a danger to himself or others?

3. Was plaintiff's protected speech a substantial or motivating factor in defendants' seizure of plaintiff?

4. Was defendants' seizure of plaintiff a substantial factor in causing him harm?

5. Did defendants use unreasonable force against plaintiff?

6. Was defendants' use of unreasonable force a substantial factor in causing plaintiff harm?

7. If plaintiff prevails on any of his claims, what is the present cash value of damages for the injuries that defendants caused him?

8. Did plaintiff use reasonable efforts to mitigate damages?

9. Did defendants act with malice, oppression, or in reckless disregard of plaintiff's rights?

10. All relevant facts relating to whether plaintiff is entitled to punitive damages against defendants and, if so, the amount thereof.

VII

The list of exhibits that may be offered at trial is attached hereto. Each party is filing separately any objections to the opposing parties' exhibits and witnesses.

VIII

The witnesses who may be called by plaintiff and defendants are as follows:

PLAINTIFFS' WITNESS LIST

1. Thomas Nguyen - Plaintiff

2. Officer Eduardo Lopez

3. Officer David Valdez

DEFENDANTS' WITNESS LIST

1. Katherine Albans

2. Sergeant Jesus Cesena (Ret.)

3. Shane Fortin

4. Officer Eduardo Lopez

1 5. Officer Michael Moran

2 6. Thomas Nguyen

3 7. John Spriet

4 8. John F. Turner

5 9. Officer David Valdez

6 **DEFENDANTS' EXPERT WITNESS LIST**

7
8 1. Marcy Worthington, MS

9 IX

10 The following issues of law, and no others, remain to be litigated upon the
11 trial:

12 1. Based on the facts determined upon the trial, are defendants entitled to
13 qualified immunity (*i.e.*, was the law governing defendants' conduct clearly
14 established, and under that law could reasonable officers believe that their conduct
15 was lawful)?

16 2. Did defendants violate plaintiff's free-speech rights under the First
17 Amendment?

18 3. Did defendants unlawfully seize plaintiff, in violation of his Fourth
19 Amendment right against unreasonable seizure?

20 4. Did defendants use excessive force against plaintiff, in violation of his
21 Fourth Amendment right against unreasonable seizure?

22 5. Is plaintiff entitled to general and compensatory damages for injuries
23 and damages proximately caused by defendants' acts and, if so, in what amount?

24 6. Is plaintiff entitled to punitive damages against one or more defendants
25 and, if so, in what amount?

26 7. Is plaintiff entitled to costs and attorneys pursuant to 42 U.S.C. § 1988
27 and, if so, in what amount?

28 ///

X

The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, this order shall supplement the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

XI

The parties contemplate filing 1-3 motions in limine.

XII

Regarding whether this case will be tried by jury, or by the Court without a jury, the parties' respective positions are as follows:

DEFENDANTS' POSITION: As the Court's docket reflects, plaintiff failed to timely serve and file a jury demand; therefore, this case should be tried by the Court. Fed.R.Civ. Proc. 38(b) & (d); 39(b). This case is uniquely suited to a bench trial: defendants believe that despite counsel's best efforts, plaintiff will repeatedly testify and argue about irrelevant, unfounded, inflammatory, and otherwise inadmissible matters, and believe that the Court is far better suited than a jury to disregard such confusing and prejudicial testimony and decide the case based on pertinent matters. Defendants will ask the Court for a chance to brief the law plaintiff cites below.

PLAINTIFF'S POSITION: The Plaintiff's position is that he did not waive his right to a jury trial. It is true that Plaintiff did not formally demand trial by jury until he was appointed Counsel and filed an Amended Complaint. Normally, a "demand for a jury trial first appearing in an amended pleading is only effective as a demand for a jury trial of issues raised the first time by the amendment." *Pradier v. Elespuru*, 641 F.2d 808, 810 n.1 (9th Cir. 1981).

However, if a case is removed from state court and "the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time." Fed. R. Civ. P.

1 81 (3)(A); *see also Segal v. Amer. Cas. Co. of Reading, Pa.*, 250 F. Supp 936, 939
 2 (Dist. Ct. Md.1966) (“under Rule 81[] a party seeking a jury must, after removal,
 3 make a formal demand for a jury trial if, in the court from which the case was
 4 removed, he would have had to take some action to exercise his right to a jury
 5 trial.”).

6 Here, the Defendants removed this case from California state court. See
 7 Docket No. 1. Plaintiff need not have taken any action to preserve his right to a
 8 jury trial in California. Litigants in California state court are guaranteed the right to
 9 trial by jury in civil cases. Cal. Cosnt. Art. 1, § 16. “In a civil cause a jury may be
 10 waived by the consent of the parties expressed as prescribed by statute.” Cal.
 11 Const. Art. 1, § 16. None of the requirements for a valid waiver of the right to trial
 12 by jury, under California law, occurred in this case. Cal. Code Civ. P. § 631 (a) &
 13 (f).

14 As Plaintiff never waived his right to a jury trial in California, he never
 15 ‘waived’ that right when Defendants removed his case to federal court. Fed. R.
 16 Civ. P. 81 (3)(A).

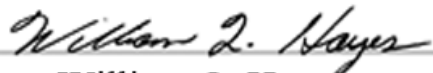
17 XIII

18 The trial of this case will be bifurcated. All issues triable to the finder of fact
 19 other than the amount of punitive damages will be tried first.

20 XIV

21 Plaintiff and Defendants will each have nine (9) hours to present their
 22 respective cases.

23 Dated: April 23, 2015

24 
 25 Hon. William Q. Hayes
 26 United States District Judge
 27
 28

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3 APPROVED AS TO FORM AND CONTENT:

4 Dated: April 10, 2015

JAN I. GOLDSMITH, City Attorney

5
6 By /s/ Timothy C. Stutler

Timothy C. Stutler

7 Chief Deputy City Attorney

8 Attorneys for Defendants SAN
9 DIEGO POLICE OFFICERS
EDUARDO LOPEZ AND DAVID
10 VALDEZ

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11 Dated: April 10, 2015

ROBERT H. REXRODE, ESQ.

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13 By /s/ Robert H. Rexrode

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15 Attorney for Plaintiff

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SIGNATURE CERTIFICATION

Pursuant to Section 2(f)(4) of the Electronic Case Filing Administrative Policies and Procedures Manual, I hereby certify that the content of this document is acceptable to Robert H. Rexrode, counsel for Plaintiff and that I have obtained counsel's authorization to affix his electronic signatures to this document.

Dated: April 10, 2015

JAN I. GOLDSMITH, City Attorney

By /s/ Timothy C. Stutler

Timothy C. Stutler

Chief Deputy City Attorney

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